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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

OAKHURST INDUSTRIES, INC., Plaintiff and Respondent, v. TUBEWAY ASSOCIATES, L.P., Defendant and Appellant.	B201113 (Los Angeles County Super. Ct. No. BC 347047)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Elizabeth A. Grimes, Judge. Affirmed.

Caldwell Leslie & Proctor, Michael R. Leslie, Robyn C. Crowther and Michael D. Roth for Defendant and Appellant.

King, Holmes, Paterno & Berliner, Howard E. King, Stephen D. Rothschild and Seth Miller for Plaintiff and Respondent.

SUMMARY

The trial court ordered specific performance of a lessee's option to purchase industrial property from the lessor after a jury, in a general verdict, (a) found that the lessee did not breach the contract, but (b) found that the lessee did breach the implied covenant of good faith and fair dealing, and (c) in that connection awarded the lessor damages of one dollar. On appeal, the lessor contends the court's award of equitable relief to the lessee in the form of specific performance was impermissible, because it was inconsistent with the jury's earlier verdict that the lessee had breached the implied covenant of good faith and fair dealing. The lessor also argues the judgment ordering specific performance must in any event be reversed because (a) the lessee failed to prove it was "ready, willing and able" to pay the $6.4 million purchase price, and (b) the lessee did not prove it complied with a provision of the option which required the parties to "attempt to agree in good faith upon a single appraiser" to determine the fair market value of the property.

We conclude the trial court did not err in ordering specific performance and accordingly affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The dispute in this case arises from a lessee's exercise of a purchase option contained in a lease executed in 1997 for a commercial property located in the City of Commerce.

1. The parties and principal actors.

Respondent Freund Baking Company (now Oakhurst Industries, Inc., doing business as Freund Baking Company (Freund Baking)) is the lessee. Freund Baking is a family-owned wholesale bakery business that employs some 400 people and also owns commercial bakery facilities in Glendale and Hayward. James Freund operated the commercial bakery business on the Commerce property and had done so for nine years by the time of trial, spending almost $10 million over the years to improve the property and install fixtures and equipment for the business. His son Jonathan was vice president

and an attorney for the company. At his father's request, Jonathan Freund represented Freund Baking in connection with the lease of the property.

Appellant Tubeway Associates, the owner and lessor of the property, is a California limited partnership, the majority owners of which were Eric Sussman and his family. Sussman managed the Tubeway property (as well as 10 to 15 other industrial, retail and multi-family properties) and was very experienced in real estate matters; he is a certified public accountant and a lecturer at UCLA, teaching real estate investment and finance.

2. The purchase option.

The lease, which was drafted for Tubeway by Sussman's lawyers, O'Melveny & Myers, gave Freund Baking an option to purchase the property.[1] The principal terms of the option were these:

- The option was exercisable by written notice at any time on and after March 1, 2005, and prior to August 31, 2005.
- Once notice was given, Tubeway was required to "promptly open escrow for the sale of the Premises" with an escrow company of its choosing.
- The date of delivery to Tubeway of Freund Baking's written notice of its exercise of the purchase option was designated the "purchase option exercise date." (This occurred on August 25, 2005.)
- Within ten business days after the purchase option exercise date, Freund Baking was required to deposit $100,000 with the escrow company, which would be applied against the purchase price at closing or paid to Tubeway as liquidated damages if closing failed to occur in accordance with the terms of the purchase option. (This date was Friday, September 9, 2005.)

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[1] James Freund wanted to buy the Tubeway property in 1996, but it wasn't for sale, so Freund insisted that the lease contain an option to purchase the property.

- The purchase price was to be the fair market value of the property (a term defined in the option).
- The parties would determine the property's fair market value as follows:
    - "Lessor and Lessee shall meet in an effort to negotiate, in good faith, the Fair Market Value of the Premises as of the Purchase Option Exercise Date."
    - "If Lessor and Lessee have not agreed upon such Fair Market Value within thirty (30) days after the Purchase Option Exercise Date, then Lessor and Lessee shall attempt to agree in good faith upon a single appraiser not later than forty (40) days after the Purchase Option Exercise Date." (The 30-day period expired on September 24, 2005, and the 40-day period expired on October 4, 2005.)
    - If the parties are unable to agree on a single appraiser within the allotted time period (by October 4, 2005), they "shall each appoint one appraiser not later than fifty (50) days after the Purchase Option Exercise Date." (This date was October 14, 2005.)
    - The two appraisers appointed are then required to appoint a third appraiser, within ten days after their appointment.
    - "If either Lessor or Lessee fails to appoint its appraiser within the prescribed time period [by October 14, 2005], the single appraiser appointed shall determine the Fair Market Value of the Premises."
    - All appraisers were required to be independent and to have certain professional qualifications.
- The "purchase price determination date" was defined as "[t]he date upon which the Purchase Option Purchase Price is fixed, whether by agreement of the parties or by appraisal …."
- Closing was required to occur within 30 days after the purchase price determination date.

- If the closing did not occur within the 30-day period, "for any reason other than [Tubeway's] default," the purchase option would terminate and the $100,000 deposit plus any interest "shall be paid to and retained by [Tubeway] as liquidated damages." Once Freund Baking exercised the purchase option, this was supposed to be Tubeway's "sole remedy in the event of [Freund Baking's] failure to close the purchase of the Premises."

3. A brief sketch of the dispute.

The genesis of the dispute was as follows: On August 25, 2005, Freund Baking exercised its option and, 50 days later, appointed its appraiser. Tubeway did not, as a consequence of which Freund Baking's appraisal – $6.4 million, or approximately $80 per square foot – became, under the terms of the option, conclusive and binding upon both parties.

When Jonathan Freund transmitted Freund Baking's appraisal to Eric Sussman and advised him that the appraisal was conclusive, Sussman – who had consistently insisted that the value of the property was $100 per square foot or higher – was "shocked" and responded angrily, saying the appraisal was "worth diddly-squat." The next day, in a handwritten note, Sussman sought to continue the negotiations on price, sent Freund the name of an appraiser Tubeway would use if needed, and ten days later, asked Freund to meet "to hammer this thing out." Freund did not respond to these overtures. On January 2, 2006, Sussman wrote to Freund again, laying out his position, including among other things that Sussman had interpreted Freund's letter selecting an appraiser to mean that Freund was "going to solicit third-party assistance in our continued negotiations, to determine the Property's fair market value," not that Freund was appointing an appraiser pursuant to the option provisions of the lease. Sussman gave Freund two choices: "to litigate" or to try to agree on a single appraiser and, if unsuccessful, follow the lease provisions on appointing appraisers. Freund Baking chose the litigation option.

4. The lawsuit.

On February 6, 2006, Freund Baking sued Tubeway, seeking an order of specific performance compelling Tubeway to transfer title to the property to Freund Baking in compliance with the terms of the purchase option.

Tubeway answered and filed a cross-complaint for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing. Among other things, Tubeway alleged that Jonathan Freund wanted Tubeway to believe he was engaging in good-faith negotiations, "while, in reality, Freund was – unbeknownst to Tubeway – executing Freund's scheme to acquire the Property at a price far below market." Tubeway also alleged that in March 2006 (after Freund Baking had sued for specific performance), "Freund attempted to increase the pressure on Tubeway by delaying the payment of rent, continuing its pattern of bad faith." (Tubeway had not received Freund Baking's March rent payment by the afternoon of March 6, 2006 (after which date late penalties would apply), and proceeded to serve a three-day notice to pay or quit, including demands for payment of late and administrative fees permitted by the lease. Tubeway alleged Freund Baking delivered a rent check the next day, but did not pay late or administrative fees.)

Tubeway alleged Freund Baking breached the following "material provisions of the Lease": the obligations 1) to negotiate in good faith as to the property's fair market value; 2) to negotiate in good faith as to the appointment of a single appraiser; 3) to participate in the process for appointment of a third appraiser; 4) to pay rent on or before the first day of each month; and 5) to pay late and administrative fees when a payment is received after its due date. In its cause of action for breach of the implied covenant of good faith and fair dealing, Tubeway recited the same breaches of the lease and further alleged that Freund Baking's "repeated failures to perform under the Lease as well as its on-going efforts to thwart the purpose of the Lease by attempting to obtain the Property at below market value, were conscious and deliberate acts designed to unfairly frustrate the agreed common purpose of the contract and to disrupt Tubeway's reasonable expectations under the Lease."

5. The evidence.

Tubeway's cross-claims for breach of contract and breach of the implied covenant of good faith and fair dealing were tried to a jury, and Freund Baking's suit for specific performance (and Tubeway's cross-complaint for declaratory relief) were tried to the court. The evidence adduced may be summarized as follows.

Both parties had long anticipated that Freund Baking would exercise the purchase option. (During the course of the lease and prior to the option period, Freund Baking had made two offers to purchase the property; both were rejected.) Earlier in the year, in April 2005, James Freund had contacted Manufacturers Bank (Bank), which handled all of Freund Baking's banking, telling the Bank that Freund Baking intended to buy the Tubeway property. (Still earlier, on March 10, 2005, Sussman wrote to Jonathan Freund telling him that his (Sussman's) broker had told him that the fair market price was $85 a foot; Sussman enclosed "comps" ranging from the mid-$70 per foot to $105 per foot.) James Freund asked the Bank to proceed with an appraisal of the property.

Freund wanted to leverage the loan as much as possible and told the Bank he preferred SBA (Small Business Administration) financing to conventional financing. (Under a conventional loan, the down payment would be 25 percent of the appraised value, while with an SBA loan, the down payment would be 10 percent.) On May 20, 2005, the Bank issued a proposal letter for Freund Baking's consideration, for discussion purposes, describing the terms and conditions of a proposed SBA financing package. Freund signed the proposal letter, and the Bank sent him a list of items required for its appraisal file. An internal Bank e-mail indicated the Bank "need[ed] to get started ordering an appraisal" and "[t]he completed appraisal will be the negotiating tool for Freund to go the owner of the property."

The Bank's appraiser valued the property at $80 per square foot ($6.372 million) as of June 22, 2005.[2]

After Freund Baking exercised the option on August 25, 2005, the following occurred:

- The option required Tubeway to "promptly open escrow" with an escrow company selected by Tubeway in its "sole and absolute discretion." Eight days later, on September 2, 2005, Sussman wrote to Jonathan Freund, telling him to "[p]lease open escrow and place the requisite deposit at Design Escrow," and suggesting Freund draft escrow instructions.[3] Sussman also enclosed "recent comps" from his broker, all indicating prices over $90 a foot, and said the broker believed the property would sell for over $100 a foot in the current market.
- On September 7, 2005, Jonathan Freund sent Alexis Ostensen (at the escrow company) the lease provisions regarding the option and Sussman's September 2nd letter, and said he believed the dates should be calculated from September 2, or the date of the option exercise notice (August 25), or when escrow instructions were signed by both sides.
- On September 8, 2005, Ostensen sent Freund an escrow number and told him to refer to that number when he remitted the $100,000 deposit. That same day, Ostensen reported to Sussman that Freund had initially called her on Friday, September 2, but she had had voice mail trouble, and Freund

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[2] The appraisal stated that the "intended use of this appraisal is to assist Manufacturers Bank in utilizing the subject property as collateral for a potential federally regulated loan transaction; the use of this appraisal for any other use is prohibited."

[3] The purchase option required that "[w]ithin three (3) business days after the Purchase Option Exercise Date, [Tubeway] and [Freund Baking] shall execute and give escrow instructions to the Escrow Company …."

called again on Tuesday, September 6, that she couldn't prepare escrow instructions without a price, that Jonathan Freund was going to send in the deposit that day (September 8), "and then based on the information you guys already have, he's going to calculate time frames for determining price, and then let us both know."

- The option provisions required Freund Baking to make the $100,000 deposit within 10 business days after August 25 (or September 9, 2005). A check was issued from Linda Freund's (James Freund's wife) Charles Schwab account on September 9, 2005, and Jonathan Freund sent the check to the escrow company via Federal Express on Monday, September 12, 2005.
- On September 23, there was an e-mail exchange between Sussman and Ostensen of Design Escrow. Ostensen confirmed she had received the $100,000, and "[w]e also have a lender calling us about the escrow instructions, but we can't prepare them until you and he have a price." Sussman responded that, "[h]opefully we will agree on a price in the next few weeks, though we'll have to see."
- Jonathan Freund testified about his discussions with Sussman as follows:
    - Shortly *before* Freund Baking exercised the option, Freund met with Sussman and showed him a broker's opinion of the value of the property, which James Freund had requested in order to give Freund Baking an understanding of the value of the property. The broker, Dave Hess of Trammell Crow, thought the value was a little over $6 million. Jonathan Freund also gave Sussman a sheet of "sales comparables" prepared by another real estate company for sales in 2004 ranging from $43 to $87 per square foot.
    - Earlier, in March 2005, Sussman had told Freund that Sussman's broker had said that Sussman "should not take one penny less" than $85 per square foot. So Freund was "pretty shocked" when Sussman

took the position in his September 2nd letter that the price should be over $100 a foot.

  - On September 23rd, Sussman sent Freund a listing for a property in Commerce at over $100 per square foot. Freund's reaction to receiving the various listings Sussman sent was that properties can be listed at any price, but that "doesn't mean it sells for that."
  - After Freund Baking exercised the option, Jonathan Freund told Sussman what Freund Baking would be willing to pay for the property. Freund told Sussman that he (Freund) "was in the 75 to 80 range." (Freund testified he wanted to pay "somewhere in the 80's, but I started at 75 … dollars a foot.") Freund also gave Sussman the comparable sales that had been included in the Bank's appraisal. Sussman told him they "were worthless."

- Freund began to look for appraisers. (Freund Baking could not use the Bank's appraiser because he was not a Member of the Appraisal Institute (MAI) as required by the lease.) Freund found it very difficult to find qualified appraisers who would be available because they were all very busy. He testified about his telephone discussions with Sussman on the difficulty of obtaining appraisers:

> "A Well, we had different discussions. We met once earlier in the month in September and had a brief discussion about that [the difficulty of obtaining appraisers], and basically we both understood that they were all really busy. We spoke to – several other conversations in the course of September and October, and we both confirmed they [appraisers] were both really busy and difficult to get in touch with.
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> "Q Did – in any of these discussions, did Mr. Sussman tell you that he thought it might be difficult for you and him to agree on a single appraiser?
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> "A Yeah. He actually told me that before we exercised.

"Q What did he tell you before you exercised?

"A Well, we were going to go according to the lease, and he basically outlined the procedure. And he said, I don't know how we'd ever be able to agree on a single appraiser, so we either agree on a price or ultimately just do the appraisals according to the lease.

"Q Was this in your earlier –

"A Right before we exercised, yes. And then there was – in general, we just had discussions about that, yes, after we exercised."

Before December 13, 2005, Sussman never gave Freund the name of an appraiser that he proposed using.

- Freund and Sussman met on October 3, 2005, and the two talked about both the difficulty of obtaining an appraiser and the "comps" that Freund gave Sussman. According to Freund, Sussman tried to convince Freund "to take his valuation of the property," and gave Freund the names of several brokers who Sussman said would know about the value. At this meeting, Sussman also said he didn't know any appraisers, "but he said I [Freund] could call some of these brokers and get the name of an appraiser." Freund said he put in calls to the brokers Sussman had named and asked those with whom he spoke for the names of appraisers. The appraiser Freund ultimately appointed (Lucas) was referred (or Lucas's partner was referred) "by one of the people I was calling to try and get an appraiser's name."
- Jonathan Freund hired Joseph G. Lucas to appraise the property. In an e-mail exchange on October 13, 2005, Freund told Lucas, "I hope you have time to do a brief check in comps to tell me if you are comfortable in performing a valuation of the property." Lucas's reply a few hours later stated that "[a]fter a quick review, it appear[s] there are no comps out there that would hurt us … yet," and "I feel pretty confident around the $80 PSF

`number." Freund testified that he told Lucas about the prior appraisal by the Bank's appraiser.

- On October 14, 2005, Jonathan Freund wrote a letter to Sussman, sent by hand delivery and mail, stating that:

> "In our ongoing attempt to determine a Fair Market Value for the building regarding Freund's Exercise of the Purchase Option, Freund Baking has selected Joseph G. Lucas of Manhattan Realty Advisors to appraise the Property. [¶] As I understand he is very busy at this time, I will forward to you his appraisal as soon as I receive it."

- Before Freund delivered his October 14th letter to Sussman, he left a message for Sussman on his answering machine, telling Sussman: "I'm delivering you a letter appointing an appraiser, and if you have any names of appraisers, please tell me now. I know they're all really really busy. In the meantime, we can still talk price, if you want."
- Sussman responded on October 16, 2005, stating in part:

> "Got your letter dated October 14th. I too have solicited some names for appraisers and will contact them. I know they are all really, really busy. In the meantime, I am absolutely in favor of trying to agree to the fair value between the two of us, but at this point we seem reasonably far apart. I remain convinced that the value is in the $100 range given what rents would be achieved for the vacant building and what recent comparable transactions indicate."

- Thereafter (on October 17, November 1, November 16, November 28), Sussman continued to send Freund listings or "comps" and other messages indicating his belief that "$100 … is the magic #" and "[w]e need to get this thing moving," and "[y]ou [Freund] cannot drag this out indefinitely." He received little or no response from Jonathan Freund, and during the same period, James Freund advised the Bank (on October 28, 2005) that Tubeway had missed the deadline for ordering an appraisal, so that the appraisal ordered by Freund Baking would be binding. (An internal Bank

e-mail dated November 18, 2005, indicated Freund had told the Bank that Tubeway continued to deliver copies of listings reflecting a value of $100 per square foot for the property, that both the Bank's appraisal and Freund's appraisal reflected a value of $80 per square foot, and that Freund believed the purchase price would be determined by the Freund Baking appraisal or in litigation.) Jonathan Freund testified he and Sussman had supper together in late November, and the price Sussman wanted then "was going up. He was above 100."

Lucas sent his appraisal to James Freund on December 6, 2005. The valuation of $6,400,000 was stated as of November 4, 2005, the date of the appraiser's personal inspection of the premises.

On December 13, 2005, Jonathan Freund transmitted Lucas's appraisal to Sussman, "[p]ursuant to § 50.4(b) of the Lease," advising Sussman that "because Mr. Lucas was the single appraiser appointed, his appraisal is now conclusive and binding on both [Tubeway] and [Freund Baking]." Sussman was "shocked" and responded angrily, by voicemails and then in a writing on December 15, 2005, stating that "you know where you can stick that letter." Sussman sought to continue the negotiations on price and sent Freund the name of an appraiser Tubeway would use if needed,[4] but Freund did not respond.

In addition to testimony from the Freunds and Eric Sussman, the jury heard testimony from Alexis Ostensen of Design Escrow, Joseph Lucas, and several witnesses from Manufacturers Bank (Irene Iwamoto, a real estate lender for the Bank; Stacy Garrison, an SBA loan officer for the Bank; and Drucilla Garcia-Richardson, a Bank vice president and relationship manager who managed the Freund family's commercial

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[4] In a January 18, 2006 letter to Jonathan Freund, Sussman again said he was still willing to negotiate purchase price or mutually agreeing on an appraiser, but that if Freund was not amenable to those suggestions, Freund was to consider his letter formal notice of Tubeway's proposal of Kathy Monfeld as the single appraiser.

lending relationship with the Bank). Tubeway also presented testimony from Don T. Hirose, an expert on the appraisal and valuation of industrial real estate in Los Angeles, who was retained by Tubeway in late September 2006 to appraise the market value of the property as of December 6, 2005, and who opined that the value on that date was $94.01 per square foot. (On cross-examination, Hirose testified that he later learned that another appraiser, Kathy Malmfeldt, had looked at the property on behalf of Sussman and had valued it "somewhere in the 80's" per square foot.)[5]

As to the late payment of the March 2006 lease payment, Sussman testified he checked his mailbox after close of business on March 6 and the payment was not there. James Freund testified he personally delivered the payment on March 6, asking the person manning the postal center to place it in Sussman's box. The payment was in Sussman's box when he checked it on March 7.

6. The jury instructions.

The jury was instructed, as to Tubeway's breach of contract claim, that:

> "Tubeway claims that Freund Baking breached this contract by failing to negotiate in good faith regarding the option to purchase the property, by failing to negotiate in good faith for the appointment of a single appraiser to evaluate the property, by failing to appoint an appraiser that was independent, by failing to timely pay rent and by failing to pay late and administrative fees in connection with late rent payments."

And:

> "To recover damages from Freund Baking for breach of contract, Tubeway must prove all of the following:

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[5] Hirose also testified that it was not uncommon for clients seeking to retain him to give him their own opinion of value, saying "[w]e face that, I face that every day."

1. That Tubeway did all, or substantially all, of the significant things that the contract required it to do, or that it was excused from doing those things;
2. That all conditions required by the contract for Freund Baking's performance had occurred;
3. That Freund Baking failed to do something that the contract required it to do; and
4. That Tubeway was harmed by that failure."

The jury was also instructed on liquidated damages, including that:

> "There is no requirement that actual damages must be suffered in order for Tubeway to recover under the liquidated damages clause. Thus, if you find that the transaction did not close within thirty days of the Purchase Price Determination Date, for any reason other than Tubeway's default, then you must award Tubeway $100,000 in liquidated damages, plus interest."

As to Tubeway's claim that Freund Baking breached the implied covenant of good faith and fair dealing, the jury was instructed as follows:

> "In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract. Tubeway claims that Freund Baking violated the duty to act fairly and in good faith. To establish this claim, Tubeway must prove all of the following:
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> 1. That Tubeway did all, or substantially all of the significant things that the contract required it to do or that it was excused from having to do those things;
> 2. That all conditions required for Freund Baking's performance had occurred;
> 3. That Freund Baking unfairly interfered with Tubeway's right to receive the benefits of the contract; and
> 4. That Tubeway was harmed by Freund Baking's conduct."

7. Tubeway's arguments to the jury

In its opening statement, Tubeway told the jury that its second claim was "that they [Freund Baking] breached the covenant of good faith and fair dealing. In other words, they didn't act in good faith. They breached the obligation that parties have in a business relationship to treat each other in good faith and be straight with what they're trying to do, not to try to trick each other." Tubeway argued Sussman thought Freund was getting an appraiser "to help engage on the comps to get some neutral advice so that [the parties] can finally narrow the gap and get to what's the fair market value of the property," but Freund "intended that October 14th designation to be the gotcha in the case, where we made it on the last day, you didn't, and now we're gonna stick you with the appraisal at the end of the day …."[6] Tubeway also mentioned the "late rent issue," pointing out that Freund Baking had never paid the rent as late as the sixth or seventh day of the month, but in March 2006, the rent check had not been delivered by the close of business on March 6 (the last day before late penalties would accrue); the rent check was in Tubeway's mailbox facility the next day.

In its closing argument Tubeway said that, as the court had previously told the jury, the court would decide Freund Baking's claim for specific performance of the purchase option under the lease. Tubeway explained that "if the purchase option failed to close – in other words, if title was not transferred within 30 days of the purchase price determination date, and that's for any reason other than a default or breach by Tubeway, then Tubeway's damages are limited to the $100,000 deposit." And, "[i]f for some reason you were to say, no that's not true, and the court were to make other rulings, then

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[6] Tubeway's opening argument continued by describing Sussman's actions after October 14th, including sending Freund more "comps" and asking Freund to meet, while Freund "was putting [Sussman] off and stalling him during this time period while they were waiting for the appraiser to come in …." At the same time, James Freund was telling his bank (on November 18, 2005) that Tubeway had failed to order its appraisal within the allotted period, so that the purchase price would be determined by Freund Baking's appraisal at $80 per square foot or by litigation.

if it was Tubeway's fault, well, then they [Freund Baking] get the $100,000." Tubeway then told the jury that "[t]he only other cause of action is breach of the covenant of good faith and fair dealing, which there's an instruction about in … the judge's instructions on that, as well. The damages are the same."

Tubeway's counsel several times mentioned Sussman having been "lulled." Counsel said that:

- The first time Freund gave Sussman "comps" was at a lunch meeting on October 3, and that counsel would explain "why that makes sense in the theory of lulling Mr. Sussman." Counsel later argued that the response to Sussman's September 2nd letter (enclosing "comps" and stating the property was worth $100 per square foot) was silence until the October 3 lunch, when Freund showed up with comps. The reasonable inference Sussman drew from this (and from Freund Baking's posting the $100,000 deposit after the September 9 deadline), Tubeway argued, was that "Jonathan's not going by the dates specifically," and Sussman "reasonably believed that they weren't going forward according to the strict timelines under the lease."[7]
- "Now, Mr. Sussman, despite the fact that he's a professor and an experienced guy in business, that doesn't mean that you can't make a mistake. That doesn't mean that you can't trust somebody and be lulled by them into being lax about the deadlines."[8]

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[7] Tubeway specifically argued in closing that (1) the deposit was not paid within 10 business days, so the jury should find that Freund Baking breached the contract; (2) there was no evidence Jonathan Freund ever discussed the name of any appraiser with Sussman by the October 4 deadline for doing so, and therefore "Tubeway has proven that Freund Baking Company has breached the lease."

[8] Sussman testified under examination by Freund Baking's counsel about a December 31, 2004 memo to his limited partners, reminding them of Freund Baking's

- Because Jonathan Freund's October 14th letter selecting Lucas as its appraiser did not state Freund was doing so pursuant to the clause in the lease requiring both parties to appoint appraisers if they failed to agree on a single appraiser, and because Freund never otherwise told Sussman "we're going to go to the next step," "Mr. Sussman was lulled and was reasonable in being lulled …." The best evidence of that, counsel argued, was "a whole series of e-mails … where after the [October 14th] letter went out, Mr. Sussman was sending faxes, was writing letters, … and finally he [Sussman] said … ' … weren't we supposed to get together to discuss the price?'" And although James Freund was telling his bank (in mid-November) that Tubeway had missed the deadline and Freund Baking's appraisal would be binding, Freund Baking "never gave [Sussman] the courtesy of letting him know that that was true."

Tubeway's counsel then enumerated the breaches of contract it claimed: failure to negotiate in good faith as to the purchase price, failure to negotiate in good faith as to a single appraiser ("[y]ou at least have to propose a name in order to meet that"), failure to make the escrow deposit on time, and failure to use an independent appraiser. "And if you find that any one of these things are true, then, yes, it's a breach, and that's it. Then the $100,000 gets transferred to Tubeway, and that's the end of the case."[9] In addition, counsel argued the March 2006 rent payment was late, and Freund Baking failed to pay

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option to purchase the property beginning on March 1, 2005, and stating that "I have absolutely no idea as to what their intentions are at this point, and I don't want to inquire about it, lest I remind them of the option's existence." Sussman testified that "I never tell my tenants about their options. It's just not my – I don't see it as my duty to tell them what their options are. … [I]n fact, I don't think I've ever told a tenant about their options once we signed the lease. I just don't do that."

[9] Tubeway also argued that closing did not occur, as the lease required, within 30 days after the purchase price determination date, and this was attributable to Freund Baking, which sought only an SBA loan that would take more than 60 days (and was on hold at the bank since October 28, 2005).

the late fees, thus breaching the contract. (In the course of this argument, counsel stated that Sussman "knew he had been sued. He knew that there was a chance that he was gonna try to be squeezed, where they [Freund Baking] were gonna try to withhold the rent, which would put him in a difficult position with the mortgage, so he was nervous," as he had never received the rent as late as the 6th of the month.)

Tubeway concluded by urging the jury to look at the exhibits for the key time period from April 2005 through December 2005, and "I would submit that … you're gonna check the box, breach, on any one of the grounds that we just went over."

8. The verdict.

The jury rendered a verdict in favor of Freund Baking on Tubeway's breach of contract claim (the vote was 9-3), and in favor of Tubeway on its claim for breach of the implied covenant of good faith and fair dealing (the vote was 11-1). The jury awarded Tubeway nominal damages of $1.00 (12-0).[10]

9. The evidence on whether Freund Baking was "ready, willing and able" to perform.

While the jury was deliberating, the court heard additional testimony on the equitable issues it had to decide: Freund Baking's claim for specific performance of the purchase option, and Tubeway's claim for declaratory relief. The court heard testimony from John Polen, Freund Baking's expert on conventional real estate loans, and from Gary Tenzer, Tubeway's expert in real estate financing. The evidence from Polen and Tenzer was addressed to issues relating to whether Freund Baking was "ready, willing and able" to close the transaction within the required 30-day period.[11] The principal

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[10] The jury was instructed that, "[i]f you decide that Freund Baking breached the contract but also that Tubeway was not harmed by the breach, you may still award Tubeway nominal damages such as one dollar."

[11] Other evidence relevant to this issue and described in this section was presented during the jury phase of the trial.

question was whether Freund Baking could have obtained a loan within that period. A separate strand of this same issue involved whether an environmental problem – some contamination from two oil wells on the property – would have prevented the timely closing of a loan.

a. The loan issue.

There was considerable testimony (and the trial court later found) that it would not have been possible to close an SBA loan within the 30-day period. Other testimony was as follows:

James Freund testified that, if the Bank had told him the SBA loan could not be accomplished within the 30-day deadline, "[w]e would have gone to Manufacturers Bank and gotten a standard real estate loan." He further testified that Freund Baking had the ability to come up with a 25 percent down payment ($1.6 to $1.7 million on a $6.5 million purchase price), as well as to make the loan payments (which would be approximately the same amount as Freund Baking's lease payments).

Tubeway's expert, Gary Tenzer, opined that Freund Baking could not have closed an SBA loan in the 30-day period required by the lease. He also saw no evidence that a conventional real estate loan was under consideration during that period, and opined that closing a conventional loan during that time of year "is a very, very difficult thing to accomplish."[12]

Tenzer also looked at the Freunds' personal financial statement as of March 3, 2006. He opined they would need $1.75 to $1.8 million for a 25 percent down payment on a conventional real estate loan, and the statement showed "ready cash" (cash and readily marketable securities) of roughly $1,275,000, so there was a shortfall of $400,000 to $500,000 necessary for the down payment. (The statement showed a net worth of over

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[12] On cross-examination, Tenzer admitted he had never been able to opine unequivocally that the Freunds "could not get the loan from Manufacturers Bank, they could not get the loan from a conventional bank, and they could not get the loan in 30 days," but thought "it's highly, highly improbable."

$40 million, $30 million of which was attributed to their stock in Freund Baking Company; the Freunds also had a residence worth $2.95 million (with a mortgage of $476,000), and other real estate worth $7.5 million (with mortgages of $3.5 million).)

Drucilla Garcia-Richardson, who managed the Freunds' commercial lending relationship with the Bank, testified that she was "intimately aware" of the financial condition of Jim and Linda Freund and their company as of the fall of 2005, and "in looking at their personal balance sheet and personal cash flow, I would be willing to recommend for approval a credit of that magnitude [approximately $5 million]." And "as an experienced commercial banker, yes, I feel that this company, that they could get a loan at the Bank, and/or at other banks." Garcia-Richardson further testified that she would have the same answer "as of today"; that the Freund family and bakery were "a strong customer of the Bank"; and that "[t]he Freunds are wealthy individuals. Their company is well capitalized and profitable …." She testified that, once the Bank has an appraisal and quantifies the environmental risk and has an accepted credit report and credit analysis, the Bank has the ability to close a real estate loan within 30 days. (Garcia-Richardson also testified that the Bank operated within market conditions in which other bankers were "lurking around trying to take your relationships away" and that means the Bank "wanted to make sure no other bank would get that real estate loan.")[13]

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[13] Tubeway elicited testimony from Garcia-Richardson about Freund Baking's "chronic overdraft activity," the Bank's downgrading at one point of Freund Baking's credit rating, defaults under existing loan agreements, and the like. But Garcia-Richardson explained on cross-examination that "all of these issues were issues that were manageable," and "[i]t was not a situation where this company and owner didn't have resources for redirecting how that balance sheet looked." She testified that the technical defaults were caused by Freund Baking's taking cash and expanding its business rather than seeking financing, that all defaults were eventually waived, and that in her opinion none of the documentation Tubeway questioned her about "would … have made the obtaining of a collateralized real estate loan from Manufacturers Bank not possible." Freund Baking "always met its tangible net worth covenant," and "[w]e had a situation where there was cash flow, where there was collateral, and we knew that the company

John Polen, who had extensive experience as a bank executive in the underwriting and approval of conventional real estate loans, including on industrial properties, opined that the Freunds would be able to obtain a conventional loan to buy the Tubeway property within 30 days of filing an application with a conventional lender.[14] He also analyzed the Freunds' personal financial statements and concluded they had "more than sufficient resources to come up with the [25 percent cash] down payment."[15] He further opined the Freunds could have gotten a loan on similar terms and circumstances in 2006, and "it appears as though they were stronger in 2006."

Irene Iwamoto of Manufacturers Bank was asked whether, based on her 30 years of banking real estate loans, "if Jim Freund one morning would have said to you, the SBA loan is taking too long; I'd like to switch to a conventional loan, would that have been doable with the Bank?" and she replied affirmatively. She further testified that, while 30 days was a "tight turnaround," the Bank had been able to close loans which had been prescreened and had had an appraisal within 30 days.

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was already servicing the property they were going to acquire because they were paying rent on it. . . . [A]nd that's how you determine credit. It's a living, moving thing with a lot of dynamics, some are controllable, some are not. All of these were controllable."

[14] Polen based his opinion on the fact that the appraisal was done, financial statements and tax returns were in hand, and "there was basically sufficient information that I could work with, or anybody – any other lender could work with, and get the deal done within 30 days. [¶] It, to me, was a very attractive loan. I think that any lender who wanted that loan would have done whatever it took to get it done in a reasonable period of time, within 30 days."

[15] Polen said "there was sufficient borrowing capacity on the house that would make up the additional amount that they needed for the down payment." In addition, "they had equity in other properties in the company in northern California, and as a practical matter, a lender could have either made a loan on their house or the other properties to generate the cash, or just take an additional collateral in these other properties and made a larger loan. [¶] One way or the other, within 30 days, it was my opinion that they would be able to obtain a loan on this property to meet the down payment requirements."

b. The environmental issue.

In May 2005, when Manufacturers Bank issued its proposal letter for an SBA financing package, one of the conditions to be satisfied was a "Phase I Environmental Report" for the property (on which two oil wells were situated) to be reviewed and approved by the Bank. An environmental site assessment dated June 21, 2005 (the Phase I report, prepared by an environmental consultant approved by the Bank), concluded that "total petroleum hydrocarbon" levels, believed to have originated from gasoline and diesel releases, were above levels requiring site remediation. The report recommended a further subsurface soil investigation in order to fully characterize the lateral and vertical extent of petroleum hydrocarbon contamination.

On July 7, 2005, the Bank's environmental approval officer, Russell Wettmarshausen, wrote to Irene Iwamoto, reporting on his review of the environmental report. He stated his understanding that Freund "did not want to do additional testing at this time," but "want[ed] to have the owner of the well investigate the problem." Wettmarshausen further reported he had obtained a "worst case" cost for remediation, from the environmental consultant that prepared the Phase I report, at about $150,000.[16] He recommended, if the Bank intended to proceed with the loan, that "an allowance for the possible remediation costs be factored into the loan, such as a hold back, until the issue is resolved."

The following day, July 8, 2005, Iwamoto wrote to James Freund and his wife, noting that because the extent of the contamination was not delineated in the June 21 report, additional borings and testing would be required, and the Bank looked forward to hearing from the Freunds "regarding the resolution of the environmental contamination

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[16] Wettmarshausen's memorandum stated: "George Johnson, who has extensive experience doing remediations, estimated that the government agencies would require three water-monitoring wells with quarterly testing for at least one year, costing approximately $50,000. In addition, he thought that soil excavation would cost no more than $100,000."

problems identified" in the report. Jonathan Freund sent the June 21 report to Sussman, and Sussman in turn demanded remediation of the contamination by an entity that owned an easement for operation of the wells. E-mails on September 12, 2005, between Iwamoto and Garcia-Richardson observed that "[a]t this point there has been no resolution to the toxicity problem," and "[t]he borrower understands that we can move forward only after the toxicity issues are resolved." Garcia-Richardson confirmed at trial that the "Phase Two" environmental report had not been ordered, and the SBA loan was "basically on hold" pending "the Phase Two and the borrower indicating that the property was available for a specific price to purchase."

At trial, Iwamoto was asked whether it was "typical that the existence of some amount of environmental contamination prevents the closing of a loan with Manufacturers Bank," and answered: "No. Could be a quantified number that we know exactly what the risk might be, and we've made loans under those circumstances." And Polen (Freund Baking's expert on real estate finance) pointed out that the environmental consultant had quantified the extent of the solution to the environmental problem at $150,000, and "that basically quantified what the risk was on the loan," and a bank would "probably put that [a]side, or 150 percent of that aside, or some amount, as a cushion to make sure that there was money to take care of that, that cleanup." Thus "because it was identified, the solution was quantified, I believe that that was – that mitigated the problem of getting the loan."

10. The trial court's decision.

After post-trial briefing, the trial court issued its decision, finding "no basis in law or equity to deny equitable relief as requested" by Freund Baking. The court further found that "specific performance will not work a forfeiture, including because the purchase price of $6,400,000 is fair and reasonable" and that "[t]o the contrary, denial of specific performance would be inequitable and would cause [Freund Baking] to forfeit its rights under the option agreement." Among other things, the court stated:

- Sussman did not respond to Freund's August 25 letter exercising the option until September 2, and then, instead of opening escrow as Tubeway was

obliged to do, told Freund to do so.[17] "To the extent there were relatively minor delays in opening escrow, such delays were excused because Mr. Sussman either caused or contributed to the delays, and neither party acted at the time as though the delays terminated the purchase option process."

- Both parties acted in good faith during the 30-day negotiation period, which was to end on September 24, 2005. They told each other their thoughts on value, neither party modified his position, and each believed they had good reasons for refusing to alter their positions. In addition, the two agreed to meet on October 3 to discuss value further.
- Freund and Sussman "had some discussions about appraisers, mostly limited to the observation that it would be difficult to find an MAI appraiser because they were all busy," and met for lunch on October 3 to discuss value and the selection of an appraiser, but reached no agreement. The court found that both parties acted in good faith in their attempt to select a single appraiser; their efforts complied with the option agreement; and apart from the agreement to meet on October 3 to further negotiate price, "there was no express or implicit agreement to extend any of the deadlines in the option agreement."
- Freund's letter of October 14, 2005 designating an appraiser "was not misleading and clearly notified Tubeway that [Freund Baking] had designated Mr. Lucas as its appraiser under the option agreement."

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[17] The court observed that the escrow company did not contact Freund Baking with an escrow number for the deposit until Thursday, September 8, and in light of this and other facts, Freund Baking made the $100,000 deposit timely, or in the alternative any non-compliance was excused by Tubeway's failure to promptly open escrow, and/or Tubeway waived Freund Baking's obligation to make the deposit by September 9, 2005 (or was estopped from complaining of untimeliness by failing to object).

- Lucas was an independent appraiser within the meaning of the option agreement, his appraisal was fair and reasonable, and his discussions with Freund Baking's representatives about the value of the property did not change his status as an independent appraiser.
- Sussman's reaction of surprise and anger and his testimony that he felt "sandbagged" when he received Freund Baking's appraisal on December 13th "does not appear to have been reasonable," as he was aware of the terms of the option, understood the deadlines, and knew Freund Baking had designated Lucas as its appraiser on October 14th.
- "The court does not find that Mr. Freund said or did or omitted to say or do anything that any reasonable person in Mr. Sussman's position would understand to mean that the parties had agreed to disregard or to extend the purchase option deadlines." Nor did the court find that any representative of Freund Baking "said or did or omitted to say or do anything amounting to a waiver or estoppel to assert [Freund Baking's] rights in the purchase option agreement …."
- The purchase price determination date under the option agreement was December 13, 2005, the date on which Freund sent the Lucas appraisal to Tubeway fixing the price at $6.4 million.
- Sussman immediately informed Freund that Tubeway would not convey the property to Freund Baking for that price, "thereby relieving [Freund Baking] of any further obligation under the purchase option, including to obtain financing or to tender the purchase price within thirty days."
- At all relevant times Freund Baking was ready, willing and able to purchase the property. The court did not believe Freund Baking could have obtained an SBA loan within 30 days, but found that "[Freund Baking] or its principals were and are able to obtain sufficient cash and traditional real estate financing within 30 days to pay the $6.4 million purchase price,

including that [Freund Baking's] principals were willing to use their personal assets to finance the transaction, [Freund Baking's] bank would have provided a conventional real estate loan within thirty days, and any number of other banks would have been willing to do the same given [Freund Baking's] financial situation."

- "[T]he environmental issues associated with the two oil wells on the property were relatively minor and would not have prevented [Freund Baking] from obtaining a conventional real estate loan within thirty days."

Judgment was entered, and the court subsequently awarded attorney fees to Freund Baking based upon the prevailing party provision of the lease. Tubeway filed timely appeals from the judgment and the attorney fee award.

DISCUSSION

Tubeway contends the trial court's award of specific performance was erroneous as a matter of law because (1) it was inconsistent with the jury's verdict that Freund Baking breached the covenant of good faith and fair dealing implied in the lease agreement; (2) Freund Baking failed to prove it was "ready, willing and able" to pay the $6.4 million purchase price within the requisite time and through trial; and (3) Freund Baking failed to prove it satisfied the "condition precedent" of negotiating in good faith as to a single appraiser. Tubeway's contentions are without merit.[18]

As the parties agree, we review the trial court's decision to grant specific performance for abuse of discretion, and we review findings related to Freund Baking's readiness and ability to perform under the substantial evidence standard.

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[18] Tubeway does not challenge the merits of the attorney fee award, claiming only that it should be reversed along with the judgment for specific performance.

A. The trial court was not precluded from ordering specific performance of the purchase option by the jury's verdict for Tubeway on its claim for breach of the implied covenant of good faith and fair dealing.

Tubeway asserts that the trial court's judgment granting specific performance "is inconsistent with, and therefore precluded by," the jury's finding that Freund Baking breached the implied covenant of good faith and fair dealing. While the point is not an easy one, we conclude Tubeway's position is without merit for several reasons (on which we elaborate, *post*):

- The first is that Tubeway has improperly applied an established legal principle – that a jury's *factual findings* on legal causes of action are binding on a trial court when it subsequently considers equitable remedies based on the same facts (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 158-159 (*Hoopes*) – to a situation in which the jury made no factual findings, but merely rendered a general verdict on a cause of action.
- The second (which is related to the first) is that when a trial court considers whether the "unclean hands" doctrine should bar a claim for specific performance, the court must consider, among other factors, "the nature of the misconduct." (See *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 979 (*Kendall-Jackson*).)
- The third is the general principle that "all that is required of a plaintiff, in a specific performance action, is that there be substantial performance by that plaintiff of his obligations under the contract." (*Superior Bedding Co. v. Erenberg* (1961) 193 Cal.App.2d 86, 92.)

Because there were no factual findings by the jury identifying "the nature of [Freund Baking's] misconduct" (*Kendall-Jackson, supra*, 76 Cal.App.4th at p. 979), there is no demonstrable conflict between the trial court's fact findings and any "issue[] of fact previously adjudicated by the jury." (*Hoopes*, *supra*, 168 Cal.App.4th at p. 158.) It was necessary for the trial court to assess any alleged misconduct in order to determine

whether the misconduct made it inequitable to require specific performance of the contract. Since the jury awarded Tubeway only $1.00 in damages for Freund Baking's breach of the implied covenant, thus suggesting that Freund Baking's breach was not substantial enough to preclude the equitable remedy of specific performance, we see no basis upon which the trial court can be precluded, as a matter of law, from concluding that Freund Baking was entitled to equitable relief.

1. The absence of factual findings by the jury.

Tubeway is correct to the extent it points out that "[f]irst-tried factual findings must be given conclusive effect …." It is well established that a jury's factual findings on legal causes of action are binding on a trial court when it considers equitable remedies based on the same facts. (*E.g.*, *Hoopes, supra,* 168 Cal.App.4th at p. 159.) (Likewise, a court may decide equitable issues first, "'and this decision may result in factual and legal findings that effectively dispose of the legal claims.'") (*Id.* at p. 157.) *Hoopes* tells us that in federal cases where legal issues are usually tried before equitable issues, the "'presumptive rule'" is that "'the first factfinder binds the second on factual issues actually litigated and necessary to the result.'" (*Id.* at p. 158 ["[w]here legal claims are first tried by a jury and equitable claims later tried by a judge, the trial court must follow the jury's factual determinations on common issues of fact"].) Thus, *Hoopes* held that the trial court erred "in disregarding the jury's verdict when ruling on equitable remedies that relied on common issues of fact previously adjudicated by the jury." (*Ibid.*)

But here, the jury made no factual findings (and was not asked to do so).[19] Because the jury made no factual findings, the parties are left to argue (and do so at

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[19] See *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347, footnote 7 ["[w]hen a jury is asked to pronounce generally in favor of the plaintiff or defendant on all or any of the issues, they render a general verdict"; by contrast, "a special verdict is one where the jury finds the facts, and leaves the judgment to the court"]. Where verdict forms ask the jury to find for plaintiff or defendant on each cause of action, they are "unmistakably a series of general verdicts." (*Ibid.*; see also *Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1409, fn. 1 ["[n]one of the verdicts here purported to merely find the

considerable length) about what the jury's verdict *must* have meant. But at the end of the day, we simply do not know what specific facts the jury found in concluding Freund Baking breached the implied covenant of good faith and fair dealing. It follows that the trial court did not err in its treatment of this general verdict. All we know is that the jury apparently found that Freund Baking did *something* that, in the words of the jury instruction, "unfairly interfered with Tubeway's right to receive the benefits of the contract," yet caused no harm to Tubeway. Tubeway's only specific argument to the jury on the point was that Freund Baking "breached the obligation that parties have in a business relationship to treat each other in good faith and be straight with what they're trying to do, not to try to trick each other." There appear to be at least three possibilities:

(1) Freund Baking argues the verdict on breach of the implied covenant must have related to its conduct with respect to the March 2006 rent payment, rather than its conduct relating to the purchase option. It theorizes that the jury could have credited Sussman's testimony that Freund Baking paid the March 2006 rent after normal business hours on March 6, and could have considered this an attempt to harass Sussman, thus breaching the implied covenant of good faith and fair dealing, but causing no damages. Freund Baking points out that the jury did not award Tubeway the $100,000 in liquidated damages, which it was required to do if Freund Baking breached the purchase option contained in the lease. (The court instructed the jury that it "must award Tubeway $100,000 in liquidated damages" if it found that the transaction did not close within 30 days of the purchase price determination date "for any reason other than Tubeway's default," and Tubeway told the jury that damages on both of its claims (breach of contract and breach of the implied covenant) were the same.)

(2) In its reply brief, Tubeway argues that the jury must have found that Freund Baking's purchase-option conduct breached the implied covenant, because (so

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facts; instead, each found for or against the plaintiffs on a particular claim or group of claims"].)

it argues) that is the only interpretation of the implied covenant verdict that comports with the jury's verdict that Freund Baking did not breach the contract (and comports with the instructions and arguments to the jury). Among other things, Tubeway argues that Freund Baking's theory (that its conduct relating to the March 2006 lease payment accounted for the implied covenant verdict) is wrong, because (a) the jury must have found the March 2006 lease payment was timely (or it would have awarded the several thousand dollars in late penalties provided in the lease) and (b) "no one pled, argued or testified that a timely-but-last-second rent payment could breach the implied covenant." (But Tubeway *did* plead in its cross-complaint that in March 2006, "Freund attempted to increase the pressure on Tubeway by delaying the payment of rent, continuing its pattern of bad faith." And Tubeway's counsel argued in closing that Sussman "knew he had been sued. He knew that there was a chance that he was gonna try to be squeezed, where they [Freund Baking] were gonna try to withhold the rent, which would put him in a difficult position with the mortgage ….")[20]

(3) A third possibility is that the jury may have thought that Freund Baking's actions *after* it appointed its appraiser on October 14 constituted the conduct by which Freund Baking was not "be[ing] straight with what they're trying to do,"

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[20] Tubeway argues that its claim of breach of the implied covenant "rested on allegations that the parties had not been strictly following [the express terms of the contract] and [Freund Baking] unfairly sought to undermine Tubeway's right to fair market value for the property," citing its cross-complaint and its closing argument to the jury. But Tubeway's argument to the jury, while trying to make the point that Sussman reasonably believed the parties were not strictly following the deadlines, never explicitly told the jury that such conduct by Freund – which Tubeway's brief (but not its jury argument) describes as "leading Tubeway to believe they were negotiating a price without strictly following contractual deadlines, and then sandbagging Tubeway in December 2005" with Lucas's dispositive appraisal – violated the implied covenant of good faith and fair dealing.

and thus breached the implied covenant of good faith. Thus in late November, Jonathan Freund and Sussman met (according to Freund), but Freund apparently said nothing to Sussman about Freund Baking's appraisal of the property (of which Freund by then knew the results). Tubeway expressly argued that the best evidence that Sussman was "lulled" into inactivity "and was reasonable in being lulled" was the "whole series of e-mails … where *after* the [October 14th] letter went out, Mr. Sussman was sending faxes, was writing letters, … and finally he [Sussman] said … ' … weren't we supposed to get together to discuss the price.'" Despite telling the Bank that Tubeway had missed the deadline and its appraisal would be dispositive, Freund Baking "[n]ever said that to Eric Sussman," and "never gave [Sussman] the courtesy of letting him know that that was true." Tubeway's opening argument had told the jury that after Freund's October 14 letter selecting an appraiser, Freund "was putting [Sussman] off and stalling him during this time period while they were waiting for the appraiser to come in …." Such a theory would comport with the jury's finding of damages of only $1.00, because nothing the Freunds did *after* the October 14 deadline for appointing an appraiser, however discourteous, could have actually caused Tubeway any harm.

The third argument appears vague and far-fetched. We include it only as a possibility. One might well conjure up more theories. In the end, however, these attempts to parse, analyze, and essentially speculate on the jury's verdict are irrelevant unless one theory of the factual findings that necessarily underlay the verdict stood out as definitive and then only if the trial court made a contrary finding.[21] But no theory is

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[21] The cases Tubeway cites to support its position that a court cannot disregard a jury's findings on issues triable at law and enter contrary findings in its exercise of equitable powers are cases in which there actually *were* conflicting factual findings as between court and jury. (*E.g., Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670, 668 [jury made special findings, including one to the effect that the defendant promised to postpone a foreclosure sale if plaintiffs had a responsible,

definitive.[22] Moreover, precedents applying the unclean hands doctrine further support the conclusion that a trial court should not be precluded, as a matter of law, from awarding specific performance because of a general verdict that unspecified conduct breached the implied covenant of good faith and fair dealing – a point to which we now turn.

2. The unclean hands doctrine as a bar to specific performance.

If a plaintiff's conduct "violates conscience, or good faith, or other equitable standards of conduct" (*Kendall-Jackson, supra,* 76 Cal.App.4th at p. 979), the doctrine of unclean hands may be invoked as a defense, both in equitable and legal actions. (See also *Conrad v. Lindley* (1852) 2 Cal. 173, 175-176 (*Conrad*) [to obtain specific performance of an agreement to purchase property, plaintiff had to show his conduct in relation to the

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prospective purchaser for the property; trial judge improperly treated the jury's verdict as advisory only and made its own findings, including that defendant did *not* make a promise to postpone the sale].)

[22] In its post-trial brief below, Tubeway did not suggest to the trial court that the jury's verdict on Freund Baking's breach of the implied covenant precluded the court, as a matter of law, from awarding specific performance. Tubeway's principal argument to the trial court was that Freund Baking's alleged "spoliation of evidence and bad faith conduct in discovery" constituted unclean hands precluding specific performance, and "[i]n addition," the jury's finding that Freund breached the implied covenant "lend[s] considerable support to Tubeway's unclean hands defense …." The trial court imposed an evidentiary sanction on Freund Baking, preventing the introduction in evidence of an October 2, 2005 memorandum from Jonathan Freund to Eric Sussman listing the names and telephone numbers of several appraisers for Sussman's consideration, which Sussman claimed he never received. The electronic evidence of the date on which the memorandum was created (Jonathan Freund's lap-top computer) was destroyed by Jonathan Freund or someone acting on his behalf, but, as the court explained in its statement of decision, it did not find that the destruction was due to bad faith or unclean hands on the part of any representative of Freund Baking. Rather, the court found that the memorandum, in both documentary and electronic form, was requested in discovery and Freund Baking had a duty to preserve the electronic form, "the failure of which warranted evidentiary sanctions" as a penalty for the discovery abuse (which "did not, in the view of the court, stain [Freund Baking's] hands in equity").

purchase was in good faith, that is, "to show that he came into Court with clean hands"].) While Tubeway cites *Kendall-Jackson* and *Conrad* as support for its claim that Freund Baking's breach of the implied covenant of good faith and fair dealing "precludes the requisite showing" that a party seeking specific performance must have acted in good faith, the cases do not support such an expansive proposition. Indeed, the contrary is so. *Kendall-Jackson* tells us that "[w]hether the particular misconduct is a bar to the alleged claim for relief depends on (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries." (*Id.* at p. 979; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 10, p. 291 [one of factors considered is whether the nature of the misconduct justifies sustaining the unclean hands defense].) In other words, the question whether a plaintiff's conduct bars equitable relief depends on the nature of the conduct. In this case, there is uncertainty as to the nature of the misconduct implied by the jury's verdict, and it was the function of the trial court to assess whether Freund Baking's conduct amounted to an equitable bar to specific performance.

The point is demonstrated in the precedents Tubeway cites, which show exactly what conduct constituted (or was alleged to constitute) the bad faith or unclean hands. Thus, in *Kendall-Jackson*, the misconduct that was alleged to support an unclean hands defense to a malicious prosecution claim violated both the letter and the spirit of a statute. (*Kendall-Jackson, supra*, 76 Cal.App.4th at p. 983.) In *Conrad*, there was testimony that plaintiff had abandoned the purchase and claimed in his own right, by a title adverse to the defendant. (*Conrad, supra*, 2 Cal. at p. 175.) Here, we simply do not know what conduct the jury considered "unfair" (but we do know that, whatever it was, the jury also thought it did not harm Tubeway).

Further, while we do not know what conduct the jury considered unfair, we do know several other things. The jury's verdict on the breach of contract claim necessarily showed, as the trial court also found, that Freund Baking did *not* breach the express terms of the contract, so Freund Baking did *not* "fail[] to do something that the contract required it to do," which included – as Tubeway specifically argued to the jury –

obligations to negotiate *in good faith* as to the purchase price, to negotiate *in good faith* as to a single appraiser, to make the escrow deposit on time, and to use an independent appraiser. Moreover, the jury awarded Tubeway only $1.00 in damages for the breach of the implied covenant, and thus necessarily concluded that Tubeway was not harmed by the breach.[23] This further confirms that, whatever the jury thought Freund Baking did to "unfairly interfere[] with Tubeway's right to receive the benefits of the contract," that conduct was not substantial enough to preclude the equitable remedy of specific performance. (See *Superior Bedding Co. v. Erenberg, supra*, 193 Cal.App.2d at p. 92 [all that is required in a specific performance action is that there be substantial performance of the plaintiff's obligations under the contract]; cf. *Petersen v. Hartell* (1985) 40 Cal.3d 102, 109 [discussing precedents stating that anti-forfeiture policy justifies awarding even willfully defaulting vendees specific performance in proper cases]; *Piedmont Publishing Co. v. Rogers* (1961) 193 Cal.App.2d 171, 192 ["[i]t is the usual practice of courts of equity to enforce specific performance of contracts of this kind [an option to purchase stock] upon application of the party who has substantially complied with their stipulations"].) Under these circumstances, the trial court was fully justified in making its own factual findings and in concluding that Freund Baking "did not have unclean hands …, including because [Freund Baking] complied with the contract, acted in good faith, and did not induce or mislead [Tubeway] or prevent [Tubeway's] performance."

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[23] Tubeway argues that the jury's award of $1 to Tubeway "indicates the jury understood – consistent with the jury instructions and what [Freund Baking] argued – that [Freund Baking's] breach would preclude [Freund Baking] from buying the property." This is pure speculation, and in any event would be directly contrary to the jury's instructions, which were that if the jury found the transaction did not close "for any reason other than Tubeway's default, then you must award Tubeway $100,000 in liquidated damages …." Moreover, the jury was expressly told the judge would decide whether Freund Baking could purchase the property.

3. Other contentions.

We note, and reject, several other of Tubeway's related contentions. First, Tubeway says that the specific performance judgment is "irreconcilable" with the jury's finding that Freund Baking breached the implied covenant, because the jury in doing so "necessarily found that Tubeway did not breach the option in refusing to sell the property for $6.4 million or that Tubeway was excused from selling." (This is because one of the elements of the claim, as stated in the jury instructions, was that "Tubeway did all, or substantially all of the significant things that the contract required it to do or that it was excused from having to do those things.") But the jury was not asked to find whether Tubeway breached the option contract, and indeed was expressly told that Freund Baking had sued Tubeway for specific performance of the purchase option "and that is something that is not for you to decide. The judge explained earlier that that's for her to decide." Of course, if the jury *had* "necessarily found" that Tubeway properly refused to sell the property, it would have awarded Tubeway the $100,000 in liquidated damages as it was instructed to do.[24]

Next, Tubeway contends Freund Baking cannot obtain specific performance "in connection with the very contract it breached," and that Freund Baking's breach of the implied covenant of good faith and fair dealing was a failure to comply with a "condition precedent" to specific performance under Civil Code section 3392. The general principles Tubeway cites are well-established, but they do not apply in the circumstances here. Only material breaches of a contract prevent specific performance (see *Superior Bedding Co. v. Erenberg, supra*, 193 Cal.App.2d at p. 92), and here, as we have already seen, the appellate court is in no position to conclude that Freund Baking's conduct breaching the implied covenant, whatever it may have been, was substantial enough to

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[24] Tubeway's argument also depends on its claim that the jury's implied covenant verdict could not have been based on Freund Baking's conduct relating to the March 6, 2006, 11th-hour lease payment.

prevent specific performance. Tubeway cites no authority for its claim that the implied covenant of good faith and fair dealing – as opposed to expressly stated provisions in a contract, none of which was breached here – constitutes a "condition precedent" to the performance of contractual obligations within the meaning of Civil Code section 3392. (Civ. Code, § 3392 ["[s]pecific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated"].) Even if compliance with an implied covenant could be treated as a "condition precedent," Tubeway again runs aground on the principle that the breach must be material for it to become a failure of a condition precedent. (*Ibid.* [proscription on specific performance does not apply when the failure to perform is "only partial" and "entirely immaterial"].)[25]

In sum, we find no basis upon which to conclude that the trial court's judgment granting specific performance was precluded, as a matter of law, by the jury's general verdict finding that Freund Baking breached the covenant of good faith and fair dealing implied in the parties' lease agreement.

B. Substantial evidence supported the trial court's conclusion that Freund Baking was "ready, willing and able" to close the transaction within 30 days of the purchase price determination date.

Tubeway argues the trial court erroneously concluded that the purchase price determination date was December 13, 2005, rather than December 6, 2005, and that Freund Baking's claim that it was ready, willing and able to close the transaction fails as a matter of law because it rests on "impermissible speculation." In any event, Tubeway

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[25] Tubeway's brief states that Freund Baking "materially breach[ed] the contract," and "unfairly interfer[ed] with Tubeway's ability to benefit from the three-appraiser process …." As we have seen, there were no factual findings by the jury to support either of these statements, and the trial court concluded otherwise.

claims, there was insufficient evidence that the environmental issues were minor and that Freund Baking could have obtained a conventional loan and the necessary down payment within requisite 30-day period. We disagree on all counts.

It is settled that a buyer seeking specific performance has the burden of proving he "was ready and able to perform his side of the bargain at the time his performance came due" (*Henry v. Sharma* (1984) 154 Cal.App.3d 665, 669 (*Henry*)) and "that he continued ready, willing and able to perform … during the prosecution of the specific performance action." (*C. Robert Nattress & Associates v. CIDCO* (1986) 184 Cal.App.3d 55, 64.) The trial court here so found, and if there is substantial evidence to support those findings, we must affirm the judgment. (*Henry*, at p. 670.)

Substantial evidence is evidence that is "reasonable, credible and of solid value," and inferences that are the product of logic and reason may constitute substantial evidence. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) "[W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Henry*, *supra*, 154 Cal.App.3d at p. 670.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Roddenberry*, at p. 652.)

1. The purchase price determination date.

The option required closing to occur within 30 days of the purchase price determination date, which was defined as "[t]he date upon which the Purchase Option Purchase Price is fixed, whether by agreement of the parties or by appraisal …." Tubeway contends that the purchase price determination date was December 6, 2005 (the date on which appraiser Lucas sent two original copies of his appraisal report to James Freund at Freund Baking's post office box), rather than December 13, 2005 (the date on which Jonathan Freund sent the appraisal to Tubeway). Tubeway asserts the trial court erred as a matter of law when it found the purchase price determination date was December 13, because the purchase price was, in the words of the option, "fixed … by appraisal" on December 6, when Lucas completed his report.

We see nothing unreasonable in the trial court's finding that the purchase price was "fixed … by appraisal" on December 13, the date on which both parties were apprised of the results of the appraisal. The claim that the $6.4 million price was "fixed" "when Lucas completed his report" makes little sense. Under that theory, the price could be "fixed" before *either* buyer or seller knew the result, depending on what mode of transmittal the appraiser chose. (It is hard to believe the parties could have intended closing deadlines to run from a date known only to one side of the transaction.) By contrast, it is sensible to conclude that a "purchase price determination date" is that date on which both buyer and seller have notice of the purchase price. That is what would occur if the price were "fixed … by agreement of the parties" or if it were "fixed … by appraisal" as the result of a three-appraiser process. There is no reason for a different result where the price is determined by a single appraiser.[26]

2. Tubeway's "impermissible speculation" argument.

Tubeway's argument that Freund Baking failed to prove it was ready, willing and able to complete the transaction within 30 days is primarily founded on a claim that all the testimony relating to Freund Baking's ability to obtain a conventional loan was "impermissible speculation." It appears Tubeway is contending that, because no conventional loan was actually pursued after December 13, all the testimony about Freund Baking's ability to obtain such a loan "rests entirely on improper hypothetical questions that assume facts directly contrary to the evidence," and thus was "impermissibly speculative and [Freund Baking's proof] fails as a matter of law …." Thus, Tubeway posits, because no one told Freund an SBA loan would take too long, and

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[26] Tubeway protests that this "would unreasonably give [Freund Baking] the unilateral power to extend the 30-day deadline." But the parties to a contract are required to act reasonably. And, if the situation were reversed (with the seller appointing the only appraiser, and the purchase price determination date, as Tubeway suggests, the date the appraiser gave his appraisal to the seller), the seller could "unilateral[ly]" reduce the 30-day period for performance by the buyer by delaying its notification to the buyer.

Freund did not tell Iwamoto the SBA loan was taking too long, James Freund "speculated" that he would have applied to Manufacturers Bank for a conventional loan, and the Bank's Iwamoto "speculate[d]" that a conventional loan was "doable" by the Bank, and "purported" loan expert Polen "speculat[ed] … regarding what might have happened if [Freund Baking] sought a conventional loan."

We cannot agree with Tubeway's contention that all testimony about Freund Baking's ability to obtain a conventional loan is speculative because no such loan was actually pursued. First, Freund Baking had no obligation to continue to pursue a loan, conventional or otherwise, after Tubeway unmistakably refused to convey the property, which occurred no later than December 15, 2005. (Cf. *Henry, supra*, 54 Cal.App.3d at p. 672 [where seller committed an anticipatory breach, the court saw "no purpose in requiring the buyers to bind themselves to a loan for which they have no immediate need," and questioned "whether a lender would make a firm commitment to loan money for the purchase of property the present owner refuses to sell"].) What Freund Baking must do is prove is that it would have been able to obtain such a loan by the time its performance was due, 30 days from December 13, 2005, and that is exactly the point to which the testimony Tubeway criticizes is addressed. It is not "speculation" for James Freund to testify as to the action he would have taken when confronted with an SBA loan that could not be completed on time. Nor is it "speculation" for Iwamoto, the Bank's real estate lender of long experience, to opine on whether or not a conventional loan for a particular customer was "doable" within 30 days. Finally, Polen, a banker with 20 years of experience in making and approving commercial real estate loans, was a qualified expert witness who did not, as Tubeway suggests, assume facts inconsistent with the evidence. He opined on the basis of Freund Baking's financial documentation and his experience that there was sufficient information for a commercial lender to work with and "get the deal done within 30 days." Reaching opinions like this is exactly what expert witnesses are supposed to do. (Evid. Code, §§ 801, subd. (b), 802, 805.)

One final note on this aspect of Tubeway's argument: Tubeway relies on *Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 545 (*Am-Cal*), for the

proposition that (in Tubeway's words) a "purely hypothetical loan" is insufficient to prove a buyer is ready, willing and able to buy property through a loan. In *Am-Cal*, however, the only admissible evidence was that plaintiff's lender did not have the financial ability to effect the necessary loan to the plaintiff at the time performance was due. (*Id*. at pp. 534, 541, 543 [evidence was "practically uncontradicted"].) Plaintiff then sought to show that a second lender, from whom plaintiff was able to obtain a loan commitment *at the time of trial* – based on a *joint* application by plaintiff *and others* to whom plaintiff assigned part of his interest in the property – would have made the same loan at the earlier time when performance was due. But the testimony was that, while the lender would have made the same loan earlier, it probably would *not* have made a loan commitment at the earlier time if plaintiff had applied individually. (*Id.* at pp. 537-538, 544.) The court's not-surprising conclusion was that plaintiff did not establish its financial ability at the time set for performance.[27] (*Id.* at pp. 544, 546.)

Am-Cal further observed that the buyer's financial ability "may be proved by showing the purchaser had liquid assets, property which could be sold and the proceeds used as collateral for a loan, or an actual loan commitment …." (*Am-Cal, supra*, 255 Cal.App.2d at p. 546.) But, as Tubeway necessarily concedes, subsequent cases have made it clear that a buyer need not show a legally binding loan commitment. As *Henry* observed, "we find no support for the iron-clad rule suggested by seller that plaintiffs could only establish ability to perform by proving they had obtained a legally enforceable loan contract. *Rather, the proof needed to show ability depends on all the surrounding circumstances.*" (*Henry*, *supra*, 154 Cal.App.3d at p. 672, italics added [evidence supported trial court's finding that the buyers had the ability to pay "in the sense that they

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[27] The court's reference to a "hypothetical loan" was in the context of plaintiff's claim (which the court rejected) that a buyer seeking specific performance "need prove ability to perform only at the time of trial, and that such proof may be introduced in the form of a hypothetical loan which could have been secured by the buyer following the seller's wrongful repudiation." (*Am-Cal*, *supra*, 255 Cal.App.2d at p. 545.)

‘“commanded resources upon which [they] could obtain the requisite credit”’”]; see *Behniwal v. Mix* (2005) 133 Cal.App.4th 1027, 1044-1045 [rejecting the assumption that ability to complete the transaction could only be shown by the presence of a current lender, legally bound to give the buyers a loan, and quoting *Henry*’s principle that the proof needed depends on all the surrounding circumstances].)

3. Substantial evidence of ability to perform.

Tubeway claims that, in any event, there was insufficient evidence that Freund Baking could have obtained a conventional loan within 30 days of December 13, 2005.

We have already recited the evidence presented on these issues, in part 9 of the factual background, *ante*, and will not repeat it all. We will repeat, however, that we cannot substitute our own deductions for those of the trial court, and that the ultimate test for substantial evidence is whether it was reasonable for the trial court to have made the ruling it made in light of the whole record. (*Roddenberry v. Roddenberry*, *supra*, 44 Cal.App.4th at p. 652.) We do not doubt that it was. We turn to Tubeway’s specific arguments.

a. The down payment.

Tubeway says Freund Baking didn’t have $1.8 million in liquid assets for the down payment, because it cannot rely on the assets of James and Lydia Freund, that is, it “cannot blur the boundaries between their assets and [Freund Baking’s] when it suits them.” For this proposition, Tubeway cites *Aladdin Oil Corp. v. Perluss* (1964) 230 Cal.App.2d 603, 614, and *Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.* (9th Cir. 1996) 97 F.3d 377, 380.) These cases refer to alter ego and corporate veil doctrines in entirely different contexts (unemployment insurance contributions and copyright issues), and have no relevance here. The only other precedent Tubeway cites is an Eighth Circuit case applying Nebraska law, where the court concluded that the evidence of the ability of the purchaser (a company that was “either insolvent or nearly so”) to close the transaction was not persuasive. (*Acme Inv., Inc. v. Southwest Tracor, Inc.* (8th Cir. 1997) 105 F.3d 412, 417.) *Acme* noted – in passing, and after already having concluded that there was “no evidence that [the bank] did or would have extended

such a loan to [the purchaser]" during the closing period – that the district court had "properly declined to consider the financial resources of [the purchaser's] principals and their other businesses," which were "in no way bound" to furnish funds. (*Ibid.*) But the circumstances here are very different from those in *Acme*. Freund is a family-owned company, and it was clear from the evidence that the Freunds *would* furnish the necessary funds. (Tellingly, the $100,000 deposit came from Lydia Freund's account.) No principle of California law prevents the trial court from considering the Freunds' willingness to use their personal assets in determining their company's ability to perform.

Next, Tubeway argues that in any event, the Freunds' assets were insufficient for the necessary down payment, as there was a $500,000 shortfall after considering their liquid assets (cash and securities of more than $1,200,000 and the $100,000 deposit). Tubeway attacks the testimony that James Freund and his wife could have withdrawn funds from their pension plan and could have borrowed against equity in their home and in other properties they own. Tubeway argues, for example, that these properties were "heavily encumbered" by nearly $4 million in debt guaranteed by the Freunds, the Freunds never discussed obtaining such a loan for the down payment with any bank, and there was "no evidence" such a loan could have been obtained during the December 2005 holiday season. Again, Tubeway overlooks the role of an appellate court in reviewing a record for substantial evidence. We do not substitute our deductions from the evidence for those of the trial court which heard that evidence: "Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical." (*Estate of Bristol* (1943) 23 Cal.2d 221, 223-224.)

In this case, Polen, a banker experienced in approving commercial real estate loans, testified that based upon the Freunds' financial statements, "there was sufficient borrowing capacity on the house that would make up the additional amount that they needed for the down payment," and the Freunds also had equity in other company

properties in northern California. The Freunds' financial statements showed they had a residence worth $2.95 million (with a mortgage of $476,000) and other real estate worth $7.5 million (with mortgages of $3.5 million). In short, as the Bank's Garcia-Richardson observed, the Freunds were "wealthy individuals," and as Polen testified, "[o]ne way or the other, within 30 days, it was my opinion that they would be able to obtain a loan on this property to meet the down payment requirements." The trial court implicitly accepted this evidence, and this court simply cannot say it was unreasonable to do so.

b. The environmental issue.

Tubeway next claims there "is no substantial evidence for the court's conclusion that the [environmental] contamination was 'relatively minor and would not have prevented [Freund Baking] from obtaining a conventional real estate loan within thirty days.'" Tubeway says this conclusion "rested on testimony that a bank *may* choose to loan money on an environmentally-contaminated property *if* the clean-up risk is appropriately quantified and the borrower sets aside funds (a holdback) to cover remediation costs." (Original italics.) Tubeway points to evidence that the environmental problem "was never resolved," and even at trial Freund Baking "didn't know whether the oil well owner had remediated"; Tubeway says that expert Polen "never opined as to whether Manufacturers Bank would have loaned money to [Freund Baking]" but rather "speculated" that other banks would have considered the environmental problem mitigated because of the quantification of the risk contained in the memorandum from Russell Wettmarshausen, Manufacturers Bank's environmental approval officer.

Once again, Tubeway draws inferences different from those drawn by the trial court (and also cherry-picks quotations from the Wettmarshausen memorandum to support its contention that the loan would not have issued without further testing to delineate the extent of the contamination). The evidence is described at part 9.b. of the factual background, *ante*. We quote the July 7, 2005 Wettmarshausen memorandum more fully. After describing the property and the Phase I environmental report, Wettmarshausen said:

> "Because of the limited testing done, the vertical and lateral extent of the contamination was not delineated. Additional borings and testing would be required. According to AES [the environmental consultant which prepared the report], the borrower [Freund] did not want to do additional testing at this time. Reportedly, he wants to have the owner of the well investigate the problem. [¶] Other than the soil contamination at the one well, no other issues were raised by AES. Because there is no easy method of estimating the cost of remediation without further testing, I asked AES for a rough estimate of a 'worst case' clean-up scenario. George Johnson, who has extensive experience doing remediations, estimated that the government agencies would require three water monitoring wells with quarterly testing for at least one year, costing approximately $50,000. In addition, he thought that soil excavation would cost no more than $100,000. ***Thus, a reasonable 'worst case' cost for remediation would be about $150,000. If the Bank intends to proceed with the loan, it is recommended that an allowance for the possible remediation costs be factored into the loan, such as a hold back, until the issue is resolved.*** Other than this, there does not seem to be any significant environmental issue that would preclude the Bank from lending on the property." (Emphasis added.)

In addition, Polen opined that the solution was quantified, and "that mitigated the problem of getting the loan," and Iwamoto of Manufacturers Bank testified that the existence of "some amount of contamination" does not typically prevent the closing of a loan with Manufacturers Bank, because it "[c]ould be a quantified number that we know exactly what the risk might be, and we've made loans under those circumstances."

Once again, we note the governing principle: when two or more inferences can reasonably be deduced from the facts, the inference drawn by the trial court is dispositive, and "'it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.'" (*Henry, supra*, 154 Cal.App.3d at p. 670, italics omitted.) Here, we cannot say that it was unreasonable for the trial court to infer from the evidence that the contamination was indeed "relatively

minor" and would not have prevented Freund Baking from obtaining a conventional loan within the requisite 30-day period.[28]

c. Ability to perform at the time of trial.

Tubeway contends we must reverse the specific performance judgment because Freund Baking failed to prove it remained ready, willing and able to perform throughout this litigation. Tubeway points to various documents it claims show that Freund Baking's financial condition worsened after 2005. Tubeway questioned Garcia-Richardson of Manufacturers Bank about these documents, and Garcia-Richardson explained on cross-examination (see footnote 13, *ante*) that "all of these issues were issues that were manageable." She also testified that she had "intimate knowledge of [Freund Baking's] financial condition today" and that it was her opinion as an experienced commercial banker that the company "could get a loan [to buy the Tubeway property] at the bank, and/or at other banks" both in 2005 and at the time of trial. Tubeway also dismisses testimony from James Freund and from Polen, both of whom testified that Freund Baking's financial condition improved after 2005. In short, there was ample evidence to support the trial court's conclusion that Freund Baking was ready, willing and able to purchase the property "at all relevant times …."[29]

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[28] Tubeway also argues that, even absent the environmental problems, there was insufficient evidence that Manufacturers Bank or any other bank would have timely funded a conventional loan. In fact there was considerable evidence on the point, from Garcia-Richardson, Polen and Iwamoto. (See part 9.a. of the factual background, *ante*.)

[29] See also *Behniwal v. Mix*, *supra*, 133 Cal.App.4th at p. 1045 ["the ability-to-perform problem is ultimately self-correcting. If the trial court orders specific performance, it is hardly going to hold the [sellers], as sellers, in contempt for not selling to the [buyers] if the [buyers] ultimately can't come up with the money. And if the [buyers] *really* can't come up with the money … then the [sellers] will get their wish and the property simply will not be sold"].

C. There is no merit to Tubeway's contention that Freund Baking failed to prove it negotiated in good faith as to a single appraiser.

Tubeway argues that "good faith negotiations regarding the appointment of a single appraiser" were a condition precedent to Freund Baking's right to appoint an appraiser, and that "neither [Jonathan Freund nor Sussman] proposed or discussed the name of a single appraiser or attempted to agree on a specific appraiser." Tubeway claims that Freund Baking and Tubeway "needed to actually propose a single mutual appraiser, and do so in good faith, to meet their obligation," and cites *Markborough California, Inc. v. Superior Court* (1991) 227 Cal.App.3d 705 (*Markborough*), for the proposition that California courts define "negotiation" to mean "a fair opportunity for both parties to accept, reject or modify the other's offers or demands." (*Id.* at p. 714.)

We cannot agree with Tubeway. *Markborough* also said that "the word 'negotiate' has no precise definition and means nothing more than the process by which parties come to or do not come to an agreement." (*Markborough, supra,* 227 Cal.App.3d at p. 714.) And, "[o]bviously, what constitutes 'negotiation' in any one case cannot be fixed with any degree of specificity …." (*Ibid.*)

In this case, we see no basis for concluding, as a matter of law, that the parties could not comply with the purchase option without specifically proposing the name of a single appraiser. The option requires the parties to "attempt to agree in good faith upon a single appraiser not later than forty (40) days after" exercise of the purchase option, and further provides that if they "are unable to agree upon a single appraiser within such time period," they are to appoint their own appraisers. Both the jury and the trial court found that Freund Baking did not breach these provisions of the contract. The jury was specifically instructed that "Tubeway claims that Freund Baking breached [the] contract … by failing to negotiate in good faith for the appointment of a single appraiser to evaluate the property," but found Freund Baking did not breach the contract. The trial court likewise found that both parties acted in good faith in their attempt to select a single appraiser, and that their efforts complied with the option agreement. There was

substantial evidence for these conclusions by both court and jury. Jonathan Freund testified about telephone discussions in September and October with Sussman on the difficulty of obtaining appraisers (and he also testified that even before Freund Baking exercised the purchase option, Sussman had told him that he (Sussman) didn't know how they would ever be able to agree on a single appraiser). As the trial court observed, Freund and Sussman met for lunch on October 3 to discuss both value and the selection of an appraiser, but reached no agreement. And as *Markborough* observed, what constitutes "negotiation" – or an attempt to agree – in any one case simply cannot be fixed with any degree of specificity. (*Markborough, supra*, 227 Cal.App.3d at p. 714.) We accordingly conclude there is no basis upon which we may properly interfere with the conclusions of the jury and the trial court on this point.

DISPOSITION

The judgment is affirmed. Oakhurst Industries, Inc. d/b/a Freund Baking Company is to recover its costs on appeal.

MOHR, J.*

We concur:

RUBIN, Acting P. J.

BIGELOW, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.